NUR SYARAFINA SA'ARI v. KERAJAAN MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
FAIZAH JAMALUDIN JC
[CIVIL SUIT NO: WA-21NCVC-23-03-2017]
24 JULY 2018

TORT: *Negligence – Medical negligence – Damages – Assessment of – Special damages – Expenses reasonably expected to be incurred due to circumstances – Medical expenses – Whether patient justified to seek follow up treatment from doctor at private hospital – General damages – Whether reasonably estimated and allowed – Whether care provided by family members ought to be estimated and awarded – Whether patient incurred expenses when requesting medical reports from hospitals – Whether patient awarded damages for pain and suffering – Suppression of patient's medical records and internal inquiry report in breach of consent judgment entered by parties in pre-action discovery proceedings – Whether aggravating factors to be taken into account – Whether patient ought to be awarded aggravated damages*

CIVIL PROCEDURE: *Discovery – Pre-action discovery – Proceedings – Claim of medical negligence – Whether patient incurred expenses when requesting for medical reports from hospitals – Discovery of medical records and information of parties involved – Whether patient should be awarded costs for pre-action discovery – Whether foreseeable that patient might take legal action against those responsible – Whether patient incurred expenses in investigation and discovery of facts prior to filing claim under tort of negligence – Whether patient ought to be awarded costs for pre-action discovery – Rules of Court 2012, O. 24 r. 7A*

This was a claim by the plaintiff for medical negligence in respect of injuries she had suffered during the birth of her first child at Hospital Bentong and the subsequent medical treatment she received at Hospital Temerloh. The plaintiff suffered a third to fourth degree perineal tear during the delivery of her baby. She was sutured by the doctors at Hospital Bentong and discharged. There was no follow up treatment by the defendants. Subsequently, the plaintiff's perineal tear resulted in an infection. The plaintiff then went to Hospital Temerloh where a vaginal examination revealed an episiotomy wound which had broken down with serious discharge. She was seen by the hospital's consultant obstetric and gynaecologist who diagnosed the plaintiff as suffering from anovaginal fistula – a third degree tear, which is an abnormal passageway between her vagina and anus. The plaintiff was then referred to Hospital Selayang where she was seen by SP1, a general and colorectal surgeon. SP1 carried out a rectovaginal repair and sigmoid colostomy on the plaintiff. The plaintiff also underwent a reversal of colostomy carried out by SP1. SP1 subsequently left the employ of Hospital Selayang for Tropicana Medical Centre, a private hospital. SP1 saw the plaintiff at Tropicana and treated her with antibiotics. Following a complaint filed by the plaintiff's husband, Hospital Temerloh conducted an internal

inquiry into the treatment of the plaintiff. The plaintiff filed a pre-action discovery under O. 24 r. 7A of the Rules of Court 2012 ('ROC') against the first to fourth defendants for discovery of the plaintiff's medical records and the names of the doctors, nurses and medical staff who had attended to the plaintiff at Hospital Bentong, Hospital Selayang and Hospital Temerloh. A consent judgment was entered for the defendants to disclose the records but the defendants failed to comply with the consent judgment. The plaintiff sent reminders and demands to the defendants and following the demands, the defendants produced the records to the plaintiff but without the internal inquiry report. The plaintiff proceeded to file this present action for medical negligence against the defendants. The defendants filed a defence denying the plaintiff's claim and pleaded that all the procedures and treatments provided to the plaintiff were done professionally in accordance with standard medical procedures. Finally, the defendants disclosed the internal inquiry report to the plaintiff. The plaintiff filed encl. 11 seeking judgment on admission based on the internal inquiry report. At the case management before the court, the defendants decided to admit liability in respect of the plaintiff's claim for negligence. The plaintiff's claim was for special, general and aggravated damages.

Held (ordering accordingly):

(1) The plaintiff's claim for special damages were for medical expenses, costs of care, costs of travelling, special food, supplements, medical equipment, telecommunications, costs of medical reports and costs of obtaining medical reports. It was unrealistic to expect a claimant to collect and file all bills and receipts with a view to bringing a claim. As long as there was oral testimony to support the expense and the expense could be reasonably expected to be incurred due to the circumstances of the case, the courts allowed the claim for special damages. (paras 23 & 24)

(2) The plaintiff, as a police officer, had received free medical treatment at Hospital Bentong, Hospital Temerloh and Hospital Selayang. However, she had incurred medical expenses at Tropicana Medical Centre after her treating doctor SP1 ended his public service at Hospital Selayang and entered private practice at Tropicana Medical Centre. It was reasonable for the plaintiff to see him at Tropicana Medical Centre for follow up treatment because he had left government service. He was the main surgeon who had treated her at Hospital Selayang and would know her condition better. The plaintiff was justified to seek follow up treatment from SP1 at Tropicana Medical Centre. The amount of RM240.80 charged by SP1 was less than one-third of the normal hospital charge of RM1000-RM2000. Applying the one-third rule in *Tang Kia Bak* and *Chai Yee Chong*, the claim of RM240.80 for medical expenses was reasonable and allowed. (paras 25, 27, 28 & 30)

(3) As for the plaintiff's claim for travelling expenses, all the plaintiff's trips were necessary for her to obtain medical treatment for her injury. The plaintiff's husband's trips were necessary to assist the plaintiff to deliver mother's milk to the newborn baby while the plaintiff was in the hospital. Therefore, the plaintiff's claim which amounted to RM3,317 was allowed. The plaintiff consumed special fruit diet, soft food, lactul solution and vitamin C during her recovery from the corrective surgery in order to avoid constipation. The plaintiff claimed the sum of RM300 for the special foods and RM300 for the supplement. Taking into account the general costs of foods and supplements, the total amount of RM600 claimed was a reasonable amount. Accordingly, the plaintiff's claim was allowed. Further, on Dr Wong's advice, the plaintiff purchased special stockings and storma bags from third party sources together with salt for cleaning the plaintiff's wounds and minimal medications. The plaintiff claimed RM740.40 for the medical equipment, which was a reasonable estimate. The amount claimed was therefore allowed. (paras 33 & 35-40)

(4) It is settled law that care provided by family members ought to be assessed and awarded as the costs of care in personal injury cases. The plaintiff claimed RM150 per day for the 15 days she was in hospital plus her mother's hotel costs in Temerloh of RM210, which totalled to the sum of RM2,460. She also claimed the sum of RM1,500 for 11 months that her mother cared for her during her injury and recovery, which totalled the sum of RM16,500. For her care at the hospital, this court found that the sum of RM50 per day, instead of the RM150 claimed, to be reasonable. This was because the plaintiff was mobile and not bed ridden. Thus, the sum of RM750 was awarded for her care at the hospital. The sum of RM500 per month was a reasonable sum for the costs of care that the plaintiff received from her mother at home. Therefore, the sum of RM5,500 was allowed for the plaintiff's care at home. Accordingly, the total sum allowed for the plaintiff's costs of care by her family members was RM6,460. (paras 42, 43 & 45-47)

(5) The plaintiff claimed the sum of RM500 as a gross estimate of telecommunications costs incurred during her injury and recovery following the corrective surgery. In the circumstances of her being separated from her newborn baby and leaving the baby in the care of her mother and family members during her multiple stays in hospital and her numerous trips to hospital, the gross estimate of RM500 of telecommunication costs over the period of 12 months was reasonable. (paras 48 & 49)

(6) The sum of RM400 was a reasonable expense incurred by a person for medical reports from three hospitals. The additional RM120 averaged to RM40 per medical report received from each of the hospitals. It would cover the costs of the plaintiff's lawyer writing to each of the hospitals requesting for the report, the various correspondences between the plaintiff's lawyer and the respective hospitals. Thus, the plaintiff's claim of RM400 for the medical reports was allowed in full. (paras 52 & 53)

(7) In determining whether the plaintiff should be awarded costs for the pre-action discovery, the question to be decided by this court was whether it was forseeable to the defendants that the plaintiff might bring legal action against them for the injuries that she had suffered as a result of the defendants' actions and/or omissions. The plaintiff had suffered a third to fourth degree perineal tear which later deteriorated into an anovaginal fistula. The defendant's own internal inquiry report concluded that it stemmed from 'failure in diagnosing at delivery' and 'lack of communication between the doctor (inter/intra department)/ doctor-patient'. Taking into account the conclusion reached by members of the board of inquiry in the internal inquiry report, it was foreseeable to the defendants that the plaintiff may be involved in legal proceedings against the hospitals and the doctors and nurses concerned. It was reasonably foreseeable that the plaintiff would take all necessary steps to find out the extent of the defendants' actions and omissions and that she would incur expenses in the investigation and discovery of these facts prior to filing a claim under the tort of negligence against the defendants. Thus, the sum of RM10,000 was a reasonable estimate of the solicitor-client costs for the pre-action discovery including the various court appearances and the letters of reminders and demands issued by the plaintiff's lawyer to the Attorney General's Chambers for production of the defendant's records pursuant to the terms of the consent judgment. (paras 56-58 & 61)

(8) By their admission of liability, the defendants admitted that the plaintiff had suffered injuries because of their negligence. The plaintiff testified that she also suffered general embarrassment and discomfort for over a year due to her injuries. This court thus awarded the global sum of RM80,000 for the pain and suffering and the loss of amenities of life suffered by the plaintiff, caused by the defendants' negligence. (paras 63-65)

(9) The aggravating factors in this case was the defendants' suppression of the plaintiff's medical records and the internal inquiry report in breach of the consent judgment entered by the parties in the pre-action discovery proceedings. The defendant's conduct had caused the plaintiff to incur avoidable costs and expenses and time in filing the pre-action

discovery, this present action and the application for judgment (encl. 11). The withholding of information and the filing of the various proceedings in court would have also caused the plaintiff unnecessary distress. The defendants' conduct was well below the standard expected of government hospitals and physicians. By their conduct, the defendants had (i) deliberately ignored the advice given by the High Court to government hospitals and physicians in the case of *Nurul Husna*; (ii) deliberately refused to disclose the internal inquiry report and its findings and instead filed a defence denying negligence; and (iii) deliberately refused and/or failed to comply with the terms of the consent judgment. It was thus reasonable and appropriate for this court to award the plaintiff aggravated damages in the sum of RM200,000. (paras 69, 74, 75 & 77)

Case(s) referred to:

Chai Yee Chong v. Lew Thai [2004] 2 CLJ 321 CA ***(refd)***

Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal [2018] 3 CLJ 427 FC ***(refd)***

Liong Thoo v. Sawiyah Hj Sirat & Ors [1981] CLJ 126; [1981] CLJ (Rep) 171 HC ***(refd)***

Morton-Norwich Products v. Intercen (No. 2) [1981] FSR 337 ***(refd)***

Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors [2015] 1 CLJ 825 HC ***(refd)***

Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 HC ***(refd)***

Tan Cheong Poh & Anor v. Teow Ah Keow [1996] 3 CLJ 665 CA ***(refd)***

Legislation referred to:

Legal Profession Act 1976, s. 126

Rules of Court 2012, O. 24 r. 7A

For the plaintiff - Khabir Dhillon; M/s Khabir Dhillon

For the defendants - Nurhafizza Azizan; SFC

Reported by Suhainah Wahiduddin

JUDGMENT

Faizah Jamaludin JC:

Facts

[1] This is a claim by the plaintiff for medical negligence in respect of injury she had suffered during the birth of her first child, Zahra Afrina binti Mohd Zahir, on 7 March 2014 at Hospital Bentong and the subsequent medical treatment she received at the Hospital Sultan Haji Ahmad Shah, Temerloh ("Hospital Temerloh"). Both hospitals are owned and operated by the Government of Malaysia through the Ministry of Health Malaysia.

[2] The plaintiff suffered a third to fourth degree perineal tear during the delivery of her baby. She was sutured by the doctors at Hospital Bentong and discharged the next day on 8 March 2014.

[3] The plaintiff's baby also suffered injury during the delivery. She suffered asphyxia and underwent resuscitation and recovery in the neonatal intensive care unit. The baby was transferred from Hospital Bentong to Hospital Temerloh on the day of her birth.

[4] After sending the plaintiff home, there was no follow-up treatment by the defendants. The plaintiff's perineal tear resulted in an infection. On 10 April 2014, the plaintiff went to the Hospital Temerloh. She complained that her wound had broken down for two weeks and she felt pain on defecation. Vaginal examination revealed an episiotomy wound of 2.4cm which had broken down with serious discharge. The plaintiff was referred to the hospital's obstetrics unit where it was discovered that the plaintiff suffered from "a gaping episiotomy wound 4 x 3cm with slough and serious discharge". She was seen by the hospital's consultant obstetric and gynecologist ("O & G consultant") who noted that there was "loss of anal spin on anterior part; no vaginal and rectal mucosa; stool seen seeping through vagina". The O & G consultant diagnosed the plaintiff as suffering from anovaginal fistula - third degree tear, which is an abnormal passageway between her vagina and anus.

[5] The plaintiff was then referred by Hospital Temerloh to Hospital Selayang, which has a center with a colorectal team.

[6] On 22 May 2014, the plaintiff was seen by Dr Wong Sze Ming ("SP1"), a general and colorectal surgeon at Hospital Selayang. She was found to have "a thin tissue between the fistula opening in vagina and anus, 0.5cm. 1 cm opening in the lower end of the vagina." SP1 testified that he had to treat the infection first before undertaking the surgical repair on the plaintiff.

[7] On 1 June 2014, the plaintiff was admitted to Hospital Selayang for "repair of anovaginal fistula KIV colostomy." SP1 carried out the rectovaginal repair and sigmoid colostomy on 2 June 2014. She was discharged on 6 June 2014.

[8] In undertaking the sphincter repair, SP1 performed a colostomy on the plaintiff, which involved making "a small cut in the abdomen and the intestinal is pulled out and an opening is made in it. The intestine is sutured to the abdominal wall." SPI testified that he does not normally perform a colostomy for sphincter repair. However, SP1 said that a colostomy was necessary in the plaintiff's case as "the defect involved almost the whole of the anal sphincter muscle. The repair was complex and hence a colostomy was needed. If colostomy was not done, the repair might break down. Normally, I do not routinely do a colostomy for sphincter repair."

[9] On 14 July 2014, the plaintiff underwent a reversal of colostomy, which was carried out by SP1. The plaintiff was discharged from Hospital Selayang on 18 July 2014.

[10] SP1 subsequently left the employ of Hospital Selayang for Tropicana Medical Centre, a private hospital. SP1 saw the plaintiff at Tropicana Medical Centre on 6 September 2014 and treated her with antibiotics. He last saw her on 2 February 2015.

Internal Inquiry Report

[11] On 21 July 2014 Hospital Temerloh conducted an internal inquiry into the treatment of the plaintiff following a complaint filed by the plaintiff's husband to the Director of Health Negeri Pahang. The members of the board of inquiry were external O & G specialists recommended by the Director of Health Negeri Pahang. The internal inquiry report ("internal inquiry report") contains the following conclusion:

10. CONCLUSION

- Failure in diagnosing third/fourth degree perineal tear at delivery
- Lack of communication between doctor-doctor (inter/intra department)/doctor-patient

Pre-action Discovery And This Suit

[12] The plaintiff filed a pre-action discovery on 23 November 2016 (Originating Summons No: WA-24NCVC-1910-11-2016) under O. 24 r. 7A of the Rules of Court 2012 ("ROC") against the first to fourth defendants for discovery of the plaintiff's medical records and the names of the doctors, nurses and medical staff who had attended to the plaintiff at the Hospital Bentong, Hospital Selayang and Hospital Temerloh.

[13] A consent judgment was entered on 9 December 2016 for the defendants to disclose the records by 6 January 2017 ("consent judgment").

[14] The defendants failed to comply with the consent judgment. The plaintiff sent reminders and demands to the defendants on 11 February 2017, 28 February 2017, 8 March 2017, 18 April 2017 and 30 May 2017. Following the demands, the defendants produced the records to the plaintiff piecemeal but without the internal inquiry report.

[15] The plaintiff proceeded to file this present action for medical negligence against the defendants on 7 March 2017.

[16] Notwithstanding the findings in the defendants' own internal inquiry report, the defendants filed a defence on 9 May 2017 denying the plaintiff's claim and pleaded that all the procedures and treatments provided to the plaintiff were done professionally in accordance with standard medical procedures.

Admission And Judgment On Liability

[17] Finally, on 1 June 2017, the defendants disclosed the internal inquiry report to the plaintiff. However, the defendants still refused to admit negligence. On 5 July 2018, the plaintiff filed an application (encl. 11) seeking judgment on admission based on the internal inquiry report.

[18] At a case management before this court on 15 August 2017, the learned Federal Counsel appearing for the defendants informed this court that the defendants have decided to admit liability in respect of the plaintiff's claim for negligence. Judgment on liability was recorded against the defendants on 30 August 2017.

Trial And Assessment Of Quantum Of Damages

[19] At the trial for quantum of damages, the following witnesses gave evidence on behalf of the plaintiff:

(i) Dr Wong Sze Ming, the consultant general and colorectal surgeon ("SP1");

(ii) The plaintiff ("SP2"); and

(iii) The plaintiff's husband ("SP3").

[20] The defendants did not call any witnesses.

[21] The plaintiff's claim is for special damages, general damages and aggravated damages.

Special Damages

[22] As held in *Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors* [2015] 1 CLJ 825; [2015] 1 MLJ 825:

> [34] Special damages are awarded for the plaintiffs' actual pecuniary damage or loss suffered between the date of negligent act and the date when court delivers judgment. Special damages must be pleaded and particularised and must be proved by either oral or documentary evidence. See *ABDA Airfreight Sdn Bhd v. Sistem Penerbangan Malaysia Bhd* [2001] 8 CLJ 1; [2001] 3 MLJ 64.

[23] The plaintiff's claim for special damages are for medical expenses, cost of care, cost of travelling, special food, supplements, medical equipment, telecommunications, cost of medical reports and cost of obtaining the medical reports.

[24] As regards the assessment of damages, the court recognises that it is unrealistic to expect a claimant to collect and file all bills and receipts with a view to bringing a claim. As long as there is oral testimony to support the expense and the expense can be reasonably expected to be incurred due to the circumstances of the case, the courts have allowed the claim for special damages: see *Nurul Husna (supra)*; *Overseas Investment Ltd v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82; [1988] 3 MLJ 332. Shankar J (as he then was) in *Overseas Investment Ltd* remarked:

> At this juncture, I would observe that it must be self-evident that it would be no easy matter for a housewife to produce at the drop of the sheriff's hat, individual receipts for each item of household furniture acquired over a lifetime of wedlock. If the registrar's approach is correct, then it behoves [*sic*] every Malaysian housewife to beware and immediately start a special file of receipts for household goods.

(i) Medical Expenses

[25] The plaintiff is a police officer. She had received free medical treatment at Hospital Bentong, Hospital Temerloh and Hospital Selayang. However, she incurred medical expenses at Tropicana Medical Centre, after her treating doctor SP1 ended his public service at Hospital Selayang and entered private practice at Tropicana Medical Centre. The receipts from Tropicana Medical Centre amounted to RM240.80.

[26] Learned Federal Counsel for the defendants relies on the Court of Appeal case of *Chai Yee Chong v. Lew Thai* [2004] 2 CLJ 321 and submits that the plaintiff should have continued her treatment at Hospital Selayang and that her claim for private medical treatment is without basis. In the majority judgment in *Chai Yee Chong*, Abdul Hamid Mohamad and Mohd Noor Ahmad FCJJ held that:

> To summarise my view on the issue, *every person has a right to seek medical treatment at a hospital of his choice be it at a government hospital or at a private hospital. But when it comes to awarding damages for such treatment, if the treatment is sought at a government hospital, the full amount expended and paid by the person should be awarded. But, if he seeks treatment at a private hospital, he has to prove, first that he is justified to seek treatment at a private hospital and, secondly, the amount incurred is reasonable*. Regarding the first hurdle that he has to cross:
>
> (a) He must prove that that particular treatment is not available at the government hospital either due to the unavailability of the necessary equipment or qualified doctors or other sufficient reasons; or
>
> (b) He must prove that though the treatment is available at a general hospital, it is not available within a reasonable period considering the urgency of the treatment. This may be due to the congestion at the government hospital or for other sufficient reasons; or
>
> (c) He must prove that that the treatment at the government hospital though available, is grossly inadequate. This may be due to lack of trained doctors in that particular field or for some other good reasons. As pointed out by RK Nathan JC in *Chong Chee Kong (supra)* with whom I agree, we are concerned with treatment, not accommodation.
>
> If the court is not satisfied that the plaintiff is justified to seek treatment at a private hospital then, depending on the facts and the circumstances of each case, the court should either dismiss the claim altogether as was done by the Supreme Court in *Pengarah Institut Perubatan & Anor* (*supra*) and

A by this court in *Hj Ariffin Hj Ismail* (*supra*) or award an amount not exceeding one-third of the expenses as was done by the Supreme Court in *Tang Kia Bak* (*supra*). It must be noted that the one-third is nowhere fixed by any written law. It is a matter of practice. If it is shown that in a particular case, even one-third is excessive, considering the expenses that otherwise would have been incurred in a government hospital, an
B amount less than one-third may be awarded.

Now, assuming that the plaintiff has crossed the first hurdle and the court is satisfied that the plaintiff is justified in seeking medical treatment at a private hospital, the plaintiff must prove that the expenses incurred and the amount claimed is reasonable taking into consideration normal
C charges at other local private hospitals. **The court may award what it considers to be a reasonable amount which may even be the full amount claimed**.

(emphasis added)

D **[27]** Dr Wong testified that it was reasonable for the plaintiff to see him at Tropicana Medical Centre for follow-up treatment because he had left government service. He was the main surgeon who had treated her at Hospital Selayang and would know her condition better. The plaintiff herself testified that the reason she had consulted Dr Wong in Tropicana Medical Centre was because he was the doctor who operated on her and gave her
E follow-up treatment at Selayang Hospital.

[28] I have to respectfully disagree with learned Senior Federal Counsel. I find that based on the facts and circumstances of the case, the plaintiff was justified to seek follow-up treatment from Dr Wong at Tropicana Medical Centre.

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[29] I also find that the medical charges at Tropicana Medical Centre reasonable. Dr Wong testified that charge of RM240.80 is not normal market rate. It should have been around RM1,000 to RM2,000 but he discounted it greatly for the plaintiff as she was his follow-up patient from Hospital
G Selayang.

[30] The amount of RM240.80 is less than one-third of the normal hospital charge of RM1,000 to RM2,000 as testified by Dr Wong. Applying the one-third rule as stated by Supreme Court in *Tang Kia Bak*, and referred to by the Court of Appeal in *Chai Yee Chong*, I find that claim of RM240.80
H for medical expenses reasonable.

[31] Accordingly, I allow the plaintiff's claim of RM240.80 for the medical charges she had incurred at Tropicana Medical Centre.

(ii) Travelling Expenses

I **[32]** The plaintiff claims the sum of RM3,470 as travelling expenses, which is made up of the following:

	Travel	Amount (RM)
1.	Plaintiff travelling from her mother's house in Bentong to Hospital Bentong. No. of times: 4 Distance: 5 km one-way; 10 km to-and-fro Cost: RM0.70 per km 10km × 0.70 × 4 = RM28	28.00
2.	Plaintiff's husband travelling from plaintiff's mother's house in Bentong to Hospital Temerloh	1,814.40
	No. of times: 12 Distance: 108 km one-way; 216 km to-and-fro Cost: RM0.70 per km 216 km × 0.70 × 12 = RM1,814.40	
3.	Plaintiff travelling from her house in Rawang to Hospital Temerloh	250.60
	No. of times: 1 Distance: 159 km one-way; 318 km to-and-fro Cost: RM0.70 per km Toll: RM28 (318 km × 0.70 × 1) + RM28 = RM250.60	
4.	Plaintiff travelling from her house in Rawang to Hospital Selayang No. of times: 23 Distance: 24 km one-way; 48 km to-and-fro Cost: RM0.70 per km Toll: RM28 48 km × 0.70 × 23 = RM772.80	772.80
5.	Plaintiff travelling from her house in Rawang to Tropicana Medical Centre No. of times: 6 Distance: 28 km one-way; 56 km to-and-fro Cost: RM0.70 per km Toll: RM36 per trip. (Total toll for 6 trips = RM216) (56 km × 0.70 × 6) + RM216 = RM451.20	451.20
6.	Plaintiff's brother and his wife travelling to visit the plaintiff at the hospital, the cost being approximately RM153.	153.00

[33] I find that all the plaintiff's trips were necessary for her to obtain medical treatment for her injury. I also find that the plaintiff's husband' trips were necessary to assist the plaintiff to deliver mother's milk to the newborn baby while the plaintiff was in hospital. Therefore, I allow the plaintiff's claim for the five head of travel claims above which amounts to RM3,317.

[34] I do not find that the plaintiff's brother and his wife's trip to visit the plaintiff (item 6 in the above table) was necessary. Accordingly, the claim for the sum of RM153 is disallowed.

(iii) Special Foods And Supplements

[35] The plaintiff testified that she consumed a special diet of fruits and soft food. She also consumed lactul solution and vitamin C during her recovery from the corrective surgery. Dr Wong said that she needed the special diet and the supplements to avoid constipation.

[36] The plaintiff claims the sum of RM300 for the special foods and the sum of RM300 for the supplement. The defendants offered the sum of RM100 for the special foods and supplement.

[37] Taking into account the general cost of foods and supplements in Malaysia today, I do not find the sum of RM100 offered by the defendants to be reasonable. I find that the total amount of RM600 claimed by the plaintiff to be a reasonable amount. Accordingly, I allow the total sum of RM600 claimed in full.

(iv) Medical Equipment

[38] The plaintiff had received free treatment at Hospital Selayang. However, on Dr Wong's advice, she purchased special stockings and stoma bags from third party sources together with salt for cleaning the plaintiff's wounds and minimal medications.

[39] The plaintiff claims RM740.70 for the medical equipment. She has receipts for RM340.70 but not the balance of RM400. Dr Wong confirmed during the trial that the estimate of RM740.70 is a reasonable estimate for special stockings, stoma bags, salt and medications.

[40] I find that the amount claimed is reasonable and therefore, allow the plaintiff's claim of RM740.70 for medical equipment in full.

(v) Cost Of Care

[41] The plaintiff testified that she received the following care from members of her family during her injury:

(i) by her mother, husband and sister for the total 15 days that she was in hospital: five days in Hospital Temerloh; five days in Hospital Selayang for the colostomy and the sphincter repair surgery; and five days in Hospital Selayang for the reversal of the colostomy; and

(ii) by her mother at home from 8 March 2014 to 2 February 2015.

[42] It is settled law that care provided by family members ought to be assessed and awarded as the cost of care in personal injury cases: see *Liong Thoo v. Sawiyah Hj Sirat & Ors* [1981] CLJ 126; [1981] CLJ (Rep) 171; [1982] 1 MLJ 286; *Tan Cheong Poh & Anor v. Teow Ah Keow* [1996] 3 CLJ 665; [1995] 3 MLJ 89, CA.

[43] The plaintiff claims the sum of RM150 per day for the 15 days she was in hospital plus her mother's hotel costs in Temerloh of RM210, which totals to the sum of RM2,460. She also claims the sum of RM1,500 for 11 months her mother cared for her during her injury and recovery, which total sum of RM16,500.

[44] The defendants did not submit on the plaintiff's claim for cost of care.

[45] For her care at hospital, I find that the sum of RM50 per day, instead of the RM150 claimed, to be reasonable. This is because the plaintiff was mobile and not bed-ridden. Also, she was able to feed and groom herself. In the circumstances, I award the sum of RM750 for her care at hospital.

[46] I find that the sum of RM500 per month to be a reasonable sum for the cost of care that the plaintiff received from her mother at home. Therefore, I allow the sum of RM5,500 for the plaintiff's care at home.

[47] Accordingly, the total sum allowed for the plaintiff's cost of care by her family members is RM6,460.

(vi) Telecommunications

[48] The plaintiff claims the sum of RM500 as a gross estimate of telecommunications costs incurred during her injury and recovery following the corrective surgery.

[49] In the circumstances of her being separated from her new born baby and leaving the baby in the care of her mother and family members during her multiple stays in hospital and her numerous trips to hospital, I find that the gross estimate of RM500 of telecommunication costs over the period of 12 months to be reasonable. The sum works out to be an average of RM41.66 per month.

[50] Accordingly, I allow the plaintiff's claim of RM500 for telecommunication costs.

(vii) Medical Reports

[51] The plaintiff had obtained various medical reports from Hospital Bentong, Hospital Temerloh and Hospital Selayang. The plaintiff claims the sum of RM400 for the medical reports. The receipts for the reports exhibited in the common bundle of documents to RM280. The defendants submit that a reasonable amount for the medical reports should be exactly the sum of RM280 as shown on the receipts.

[52] I agree with the submission of the plaintiff's counsel that the sum of RM400 is a reasonable expense incurred by a person for medical reports from three hospitals. The additional RM120 averages to RM40 per medical report received from each of the hospitals. It would cover the costs of the plaintiff's lawyer writing to each of the hospitals requesting the report, the various correspondences between the plaintiff's lawyer and the respective hospitals.

[53] In the circumstances, I allow the plaintiff's claim of RM400 for the medical reports in full.

Pre-Action Discovery

[54] As stated above, the plaintiff had filed a pre-action discovery (OS No: WA-24NCVC-1910-11-2016) under O. 24 r. 7A of the ROC to obtain discovery of her medical records and the names of the doctors, nurses and medical staff who had attended to her at the Hospital Bentong, Hospital Selayang and Hospital Temerloh. Although a consent judgment was entered on 9 December 2016 in that action for the defendants to produce the records, the defendants failed to abide by the terms of the consent judgment. After the due date stipulated in the consent judgment for the defendants to produce the documents had expired, the plaintiff's counsel had to send several written reminders and demands to the Attorney General Chambers, who is acting for the defendants, before the records were disclosed.

[55] The internal inquiry report was only disclosed after the defendants had filed their defence in this present suit.

[56] In determining whether the plaintiff should be awarded costs for the pre-action discovery, the question to be decided by this court is whether it was foreseeable to the defendants that the plaintiff might bring legal action against them for the injuries that she had suffered as a result of the defendants' actions and/or omissions. McGregor on *Damages* states that "it is necessary for the claimant to show that the defendant could reasonably have foreseen that the claimant might become involved in legal proceeding with a third party." It cites the case of *Morton-Norwich Products v. Intercen (No. 2)* [1981] FSR 337, where in an action for infringement of patent, the claimants successfully recovered as damages, the costs incurred in bringing a discovery action against HM customs since it was held "to be reasonably foreseeable to the defendant infringers that the claimant would take all necessary steps to find out the extent of the defendant's activities and thereby incur expense in investigation and discovery of the full facts."[1]

[57] The plaintiff had suffered a third to fourth degree perineal tear which is the worst type of perineal tear. It later deteriorated into an anovaginal fistula. The defendants' own internal inquiry report concluded that it stemmed from "Failure in diagnosing third/fourth degree perineal tear at delivery" and "Lack of communication between doctor-doctor (inter/intra department) / doctor-patient". The plaintiff had to undergo a sphincter repair surgery and a colostomy in order to repair the anovaginal fistula. She then had to undergo a reversal of colostomy surgery.

[58] In the circumstances and taking into account the conclusion reached by members of the board of inquiry in the internal inquiry report, I find that it was foreseeable to the defendants that the plaintiff may be involved in legal proceedings against the hospitals and the doctors and nurses concerned. I also

find that it was reasonably foreseeable that the plaintiff would take all necessary steps to find out the extent of the defendants' actions and omissions and that she would incur expenses in the investigation and discovery of these facts prior to filing a claim under the tort of negligence against the defendants.

[59] I find that the costs incurred for the pre-action discovery not to be remote and is accordingly recoverable by the plaintiff.

[60] What is the cost incurred by the plaintiff? The plaintiff's counsel submitted that cost that he will be billing the plaintiff for the originating summons filed in the pre-action discovery (Civil Suit No: WA-24NCVC-1910-11-2016) is RM10,000. The legal services in respect of the pre-action discovery had been provided by the plaintiff's lawyer to her and legal costs have accordingly been incurred by the plaintiff. Learned counsel for the plaintiff submits that RM10,000 is a "fair estimate of the solicitor-client costs for an originating summons to secure pre-action discovery of documents". Although the plaintiff's lawyer has yet to bill for the legal services provided, the costs for the legal services rendered had been incurred and the plaintiff would be liable for the legal fees for the pre-action discovery once the bill of costs is issued, subject to any taxation of the said bill of costs under s. 126 of the Legal Profession Act 1976.

[61] I find that the sum of RM10,000 to be a reasonable estimate of the solicitor-client costs for the pre-action discovery including the various court appearances and the letters of reminders and demands issued by the plaintiff's lawyer to the Attorney General's Chambers for production of the defendants' records pursuant to the terms of the consent judgment.

[62] Accordingly, I award the sum of RM10,000 for legal costs incurred in relation to the pre-action discovery.

General Damages

Pain And Suffering And Loss Of Amenities Of Life

[63] By their admission of liability, the defendants admit that the plaintiff suffered injuries because of their negligence. The injuries, which are as follows, had caused her considerable pain and suffering:

(i) fourth degree perineal tear:

The first injury the plaintiff suffered was a third to fourth degree perineal tear, which is the worst level of perineal tear, during the delivery of her child;

(ii) Anorectal-vaginal fistula:

The second injury the plaintiff suffered was an anorectal-vaginal fistula. The third defendant's own O & G consultant obstetric and gynecologist diagnosed the plaintiff to be suffering from a third degree tear anovaginal fistula, which is an abnormal passageway between her vagina and anus;

(iii) Colostomy surgeries:

The third injury the plaintiff suffered was the colostomy surgeries, namely the (i) colostomy surgery performed by SP1 when he performed the rectovaginal repair on 2 June 2014 and (ii) the reversal of colostomy surgery on 18 July 2014. The colostomy necessitated the plaintiff to wear a colostomy bag for approximately one and half months;

(iv) Caesarean section:

The fourth injury the plaintiff suffered was the caesarean section that had to be performed for the delivery of the next child. The child had to be delivered by caesarean section because of the fourth degree perineal tear and the anorectal-vaginal fistula suffered by the plaintiff. SP1 testified that he had advised the plaintiff that she had to undergo a caesarean section for her next birth instead of natural delivery owing to the fourth degree perineal tear and the anorectal-vaginal fistula that she had suffered; and

(v) Permanent scars:

The fifth injury suffered by the plaintiff is the permanent scars from the colostomy surgery and the caesarean section

[64] The plaintiff testified that she had also suffered in the following manner as a result of the injuries:

(i) she could not be intimate with her husband for over a year;

(ii) her career as a policewoman suffered owing to her prolonged sick leave;

(iii) her first child was taken away from her after birth due to her hospitalisations; and

(iv) she suffered general embarrassment and discomfort for over a year due to the injuries.

[65] Based on the defendants' admission of liability, the medical records and the internal inquiry report, I accept and believe the plaintiff's testimony. For this reason, this court awards the global sum of RM80,000 for the pain and suffering and the loss of amenities of life suffered by the plaintiff caused by the defendants' negligence.

Aggravated Damages

[66] The plaintiff seeks additional compensation in the form of aggravated damages. The Federal Court had recently confirmed in the case of *Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal* [2018] 3 CLJ 427; [2018] 3 MLJ 281, that aggravated damages in addition to general damages can be awarded in cases of medical negligence.

[67] The question before the Federal Court in *Dr Hari Krishnan* was:

> Whether aggravating factors should be compensated for as general damages, therefore rendering a separate award of aggravated damages unnecessary, as decided by the English Court of Appeal in *Richardson v. Howie* [2004] EWCA Civ 1127 and explained in *Michael Jones' Medical Negligence* (4th Edn, 2008) para 12-011.

[68] The Federal Court answered the question in the negative and affirmed the award by the High Court of aggravated damages in the sum of RM1,000,000 in addition to general damages of RM200,000 for pain and suffering and loss of amenities of life. Raus Sharif CJ in delivering the decision of the Federal Court held:

> [98] Aggravated damages have in fact been awarded as a separate head of damages by Malaysian courts. In the recent decision of this court in *Mohd Ridzwan bin Abdul Razak v. Asmah bt Hj Mohd Nor* [2016] 4 MLJ 282, the High Court's award of aggravated damages was upheld. This court held that:
>
> > In appropriate cases, substantial damages may be awarded for any indignity, discomfort or inconvenience suffered; even aggravated damages may be awarded in light of the motive or conduct of the tortfeasor (*Rookes v. Barnard* [1964] AC 1129(HL) at pp. 1121-1123; *W v. Meah* [1986] 1 All ER 935). As an analogy, in *Appleton v. Garrett* [1996] PIQR P 1 aggravated damages were given to patients of a dentist for injury to feelings, mental distress, anger and indignation upon learning that much of the dental treatment given to them was unnecessary and to a large extent performed on healthy teeth. The dentist had deliberately and in bad faith concealed from them the true condition of their teeth so that he could carry out dental work for profit ...
> >
> > In the circumstances of this case it was reasonable for the High Court to grant the general and aggravated damages for the proven tort of sexual harassment.
>
> [99] It can be seen from the above cases that aggravated damages can be and have been awarded as a separate head of damage in tort. For example, aggravated damages are frequently awarded in defamation cases for injury to a person's reputation. There is no reason to exclude this kind of damages from medical negligence cases, which involve real injury to a person's body. In the circumstances, we answer the second question in the negative. As such, the doctors' appeal on quantum is dismissed.

[69] The aggravating factors in this case is the defendants' suppression of the plaintiff's medical records and the internal inquiry report in breach of the consent judgment entered by the parties in the pre-action discovery proceedings.

[70] The High Court in *Nurul Husna*, had held that patients have a right of access to their medical records "based on the fiduciary relationship between the patient and the doctor". Vazeer Alam Mydin Meera JC summarised the legal position in Malaysia in relation to a patient's right of access to medical records as follow:

> [21] Based on the legal duties and rights that arise from the physician-patient fiducial relationship, and further having regard to the provisions in the guideline and the common law principles, the legal position in Malaysia *vis-à-vis* the patient's right of access to medical records can be summarised as follows:
>
> (a) The ownership of a patient's medical record vests with the physician or hospital as the case may be. However, the physician or hospital must deal with the medical records in the best interest of the patient;
>
> (b) The patient has an innominate and qualified right of access to his medical records and there is a corresponding general duty on the part of the physician or hospital to disclose the patient's medical records to the patient, his agents, medical advisers or legal advisers;
>
> (c) The physician or hospital may refuse to disclose partly or wholly the medical records to the patient in certain limited circumstances, such as, but not limited to, situations when such disclosure would be detrimental or prejudicial to the patient's health in that the information is likely to cause serious harm to the physical or mental health of the patient or of any other individual contained in the medical records; or when such disclosure would divulge information relating to or provided by an individual, other than the patient, who could be identified from that information;
>
> (d) When the circumstances giving rise to such qualification for refusal to disclose does not present itself, and when the request for disclosure is reasonable, having regard to all the circumstances, the physician or hospital shall give copies of the medical records to the patient upon payment of reasonable copying charges.

[71] His Lordship went on to advise physicians and hospitals to grant access to a patient's medical records unless there were circumstances warranting the withholding of the medical records for the reasons discussed in para [21] of the said judgment.

[72] In this present action, the defendants' non-disclosure of the plaintiff's medical records was exacerbated by the defendants non-compliance with the consent judgment entered in this court for the records to be disclosed. The plaintiff's solicitor had to send numerous reminders and demands to the defendants after the expiry of the due date in the consent judgment before the defendants disclosed the medical records. The disclosure was made piecemeal and the internal inquiry report was not disclosed until after the

defendants had filed their defence. The plaintiff's counsel submitted that the plaintiff had to file this action before all the medical records and the internal inquiry report were disclosed in order to avoid this action from being statute-barred.

[73] Furthermore, notwithstanding the finding in the defendants' internal inquiry report, which concluded that the defendants' negligence caused plaintiff's injury, the defendants refused to admit liability but instead filed a defence denying liability. It was only after the plaintiff had filed an application for judgment based on the findings in the internal inquiry report did the defendants admit negligence.

[74] The defendants' conduct had caused the plaintiff to incur avoidable costs and expenses and time in filing the pre-action discovery, this present action and the application for judgment (encl. 11). In my view, the withholding of information and the filing of the various proceedings in court would have also caused the plaintiff unnecessary distress. The plaintiff is a low-ranking policewoman. From my observation of her during the trial, she was neither sophisticated nor highly educated. And she was clearly overwhelmed and upset by the whole experience.

[75] I find that the defendants' conduct in this present action to be well below the standard expected of government hospitals and physicians. By their conduct, the defendants had (i) deliberately ignored the advice given by the High Court to government hospitals and physicians in *Nurul Husna*; (ii) deliberately refused to disclose the internal inquiry report and its findings and instead filed a defence denying negligence; and (iii) deliberately refused and/or failed to comply with the terms of the consent judgment.

[76] In *Dr Hari Krishnan*, there was no reference of similar misconduct on the part of the defendants in that case. Nevertheless, the Federal Court upheld the High Court's award of aggravated damages in the sum of RM1,000,000

[77] Accordingly, in light of the conduct of the defendants in this present action, I find that it is reasonable and appropriate for this court to award the plaintiff aggravated damages in the sum of RM200,000.

Interest And Costs

[78] Interest on the various heads of damages are awarded as follows:

(a) Interest on special damages fixed at 4% per annum from 7 March 2014 (date of incident);

(b) Interest on general damages and aggravated damages at the rate of 8% per annum from 13 March 2017 (date of service of process); and

(c) Post-judgment interest from the 30 August 2017 ie, date of admission and recording of liability fixed at rate of 5% per annum until full settlement.

[79] Costs RM40,000 is awarded to the plaintiff and is to be paid by the defendants to the plaintiff subject to the payment of the allocator fee.

Order

[80] So ordered accordingly.